**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **CHRISTOPHER VAN DOWSEY** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 225,210 |
| **INDUSTRIAL ELECTRIC COMPANY** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **EMPLOYERS MUTUAL CASUALTY CO.** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant requests Appeals Board review of Administrative Law Judge Bruce E. Moore's August 31, 2001, Post-Award Medical Award.

### APPEARANCES

Claimant appeared by his attorney, William L. Townsley, III of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, James M. McVay of Great Bend, Kansas.

### RECORD

The Appeals Board (Board) has considered the record listed in the Award.

### ISSUES

The original Award was entered in this matter on December 21, 1998. That Award was timely appealed to the Board. In its Order dated August 20, 1999, the Board affirmed the Administrative Law Judge's (ALJ) Award except for the finding that claimant proved a 29 percent work task loss instead of the 21 percent work task loss found by the ALJ. The Board's Order also approved and adopted the order of the ALJ that "Future medical will be considered upon proper application."

In a letter dated March 28, 2001, claimant's attorney made a demand upon the respondent and its insurance carrier to provide additional medical treatment for claimant's

low back injury through Scott R. Jahnke, D.O. Thereafter, on April 6, 2001, claimant filed an Application for Post-Award Medical with the Workers Compensation Division.[1] After a May 11, 2001, hearing, the ALJ in his August 31, 2001, Post-Award Medical Award, that is the subject of this appeal, denied claimant's request for additional medical treatment. The ALJ found, "...Claimant's current need for medical treatment, if any, relates to his work activities with Dowsey Home Improvements, and are not the natural and probable consequence of his previous injury and surgery."

Claimant appeals and contends the ALJ erred in denying claimant's request for additional medical treatment. The claimant argues claimant's testimony coupled with the medical opinions of neurosurgeon Paul S. Stein, M.D., proved that claimant's current need for medical treatment is a natural and probable progression of his initial June 5, 1996, low back injury and not the result of a new and separate accident.

Respondent, however, contends the evidentiary record, which includes three surveillance videotapes of claimant's activities while working as a self-employed contractor, prove that claimant's current need for medical treatment is not related to his June 5, 1996, low back injury. But, instead, his need for medical treatment is related to his present work activities as a self-employed contractor. Thus, respondent requests the Board to affirm the ALJ's award that denied claimant's entitlement to additional medical treatment.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments contained in their briefs, the Board makes the followings findings and conclusions:

Claimant injured his low back while employed by the respondent on June 5, 1996. After conservative medical treatment was attempted, claimant underwent surgery performed by orthopedic surgeon Kris Lewonowski, M.D., on January 15, 1997. Dr. Lewonowski performed an L5 laminectomy and an L4-S1 instrumented posterolateral fusion with implantation of EBI bone stimulator. The stimulator was removed on August 21, 1997.

Dr. Lewonowski released claimant on October 14, 1997, to return to work with permanent restrictions pursuant to a functional capacity evaluation. Those permanent restrictions were: lifting limited to 50 pounds occasionally and not more than 30 pounds frequently; standing, sitting, kneeling, bending, stooping, and weighted reaching limited to no more than frequently; ladder climbing limited to occasionally; and no restrictions on

[1] This Application for Post-Award Medical was filed pursuant to K.S.A. 44-510k which provides that an ALJ's award on request for post-award medical is a final award subject to Board review and then review by the Kansas Court of Appeals.

walking, squatting, or unweighted reaching. Respondent was unable to accommodate claimant's restrictions. After he was released by Dr. Lewonowski, claimant did not find employment until he went to work for United Methodist Youthville as a family support worker on June 30, 1998.

While claimant was employed by United Methodist Youthville, he returned to see Dr. Lewonowski on March 2, 1999. At that time, claimant gave a history to Dr. Lewonowski that he had developed an "achy" type pain in the left hip area with a sharp pain in the middle of his back. He also had complaints of headaches secondary to muscle tension. Dr. Lewonowski found claimant very de-conditioned and felt that he would benefit from a physiatry evaluation by physiatrist Scott R. Jahnke, D.O. and treatment program under his direction. As a result of that recommendation, the ALJ, in an Order dated May 10, 1999, found claimant entitled to medical care through Dr. Lewonowski as the designated authorized treating physician with Dr. Jahnke authorized to provide treatment and conditioning for claimant's low back and hip complaints.

Claimant first saw Dr. Jahnke on June 30, 1999, with complaints of pain in both hips that radiated down to both knees with more severe pain on the left than the right. He had tightness in the middle and lower back as well as headaches. Dr. Jahnke's assessment was status post L4-S1 fusion, lumbar segmental dysfunction, bilateral sacroiliitis with right piriformis syndrome and chronic pain syndrome. The doctor prescribed a course of physical therapy and placed claimant on pain and anti-inflammatory medication.

Dr. Jahnke followed claimant through the last time that he saw claimant on April 28, 2000. At that time, claimant had complaints of neck pain and significant problems with lumbar dysfunction with spasms as well as sacroiliac problems. The doctor's assessment on that visit was improved depression, stable bilateral sacroiliitis with piriformis syndrome, lumbar segmental dysfunction continuing with exacerbation of lumbar spasms, chronic pain syndrome and cervicalgia improved. Dr. Jahnke continued claimant on pain and muscle relaxant medication and recommended that claimant see a therapist in Newton, Kansas, for integrative techniques for possible further relief. He indicated that he would see the claimant back in a month.

For reasons not clear in the record, claimant did not return to see Dr. Jahnke. At the post-award hearing, claimant testified that he no longer was taking any of the medications prescribed by Dr. Jahnke because he had lost his job with United Methodist Youthville and also had lost the insurance that was paying for the medication. Thus, claimant was only taking over-the-counter medications of Tylenol, ibuprofen, Advil, and Aleve. The record does not explain why claimant's medications had not been provided as continuing medical treatment for his work-related low back injury by respondent's insurance carrier.

Claimant was unemployed from the time he lost his job with United Methodist Youthville on June 30, 2000, until he started his own business in January of 2001. Claimant is a self-employed contractor d/b/a Dowsey Home Improvement. Claimant described his job duties as generally doing a little bit of painting, mowing yards, cleaning up repossessed homes which includes a little bit of guttering work, fixing the window seals, framing windows, and doing some forming for preparation to pour concrete.

At the post-award hearing, claimant described his present low back symptoms as throbbing, real stiff and sore, numbness and sharp pain. Claimant also has constant pain in his hips and pain in his legs. He continues to do stretching exercises daily and also walks approximately one mile per day when the weather permits. Since claimant saw Dr. Jahnke in April 2000, his symptoms have remained about the same with a little worsening. His discomfort is more of a constant discomfort instead of occasional discomfort. But he does not have any symptoms that he did not have before. Claimant has worked within the restrictions given by Dr. Lewonowski and the heaviest items that he lifts are ten foot two by fours and an aluminum ladder. He is able to work at his own time schedule which includes taking frequent breaks and changing job tasks as he is working through the day.

Claimant was asked whether he had done any work while working as a self-employed contractor that would caused him to injure or aggravate his low back. Claimant answered "No" with the qualification that doing something everyday hurts my back, but it also hurts sitting at home.[2] Claimant was also asked if the problems he was now having with his back were the same problems as he had when he last saw Dr. Jahnke. Claimant replied, "Yes."[3]

After the May 11, 2001, post-award hearing, the respondent hired an investigator to perform videotape surveillance of claimant's work activities. The videotapes were admitted into the record at claimant's deposition that was taken by the respondent on July 18, 2001. The videotape marked as exhibit number one consists of 39 minutes showing claimant working a few minutes each of three days, May 14, 15, and 16, 2001. The videotape marked exhibit number two is 39 minutes showing claimant's working on May 24, 2001, and exhibit number three is 101 minutes of claimant working on June 4, 2001. Claimant admitted that his activities shown in the videotapes were more strenuous than the work activities that he described to the ALJ at the May 11, 2001, hearing. Claimant agreed the videotape showed him pouring cement in addition to forming in preparation of pouring the concrete. In contrast, claimant testified before the ALJ that he did not pour or finish cement. But claimant also testified the work that he performed on May 24, 2001, and June 4, 2001, was the first time since he had started as a self-employed contractor that he had

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[2] Proceedings, May 11, 2001, p. 38.

[3] Proceedings, May 11, 2001, pp. 38-39.

either poured cement or dug out dirt with a shovel in preparation of pouring cement in addition to setting the forms in preparation of pouring the cement.

Claimant went on to testify that the work he performed as shown on the videotapes did not exceed the permanent restrictions imposed by Dr. Lewonowski. Moreover, although he was working at times on his hands and knees and bent over, he never was in one position constantly for more than 2 hours of his normal workday. In fact, claimant testified he never worked in a bent over position for probably more than a few minutes at a time.

At his attorney's request, claimant was examined and evaluated by neurosurgeon Paul S. Stein, M.D. on May 29, 2001. Dr. Stein had available for his review the medical treatment records of Dr. Lewonowski and Dr. Jahnke. Dr. Stein also had for review the transcript of the May 11, 2001, post-award hearing testimony of claimant.

Claimant provided Dr. Stein with a history of not much improvement in his symptoms since his surgery. Additionally, claimant told Dr. Stein if he had it to do all over again he would not chose the surgery.

Claimant's current complaints were pain in the lower back that radiated sometimes all the way up to his neck and up the back of his head. He has frequent headaches in the evening. The pain will also radiated down into both legs, more intense on the right. Claimant related his current symptomatology as very similar to the symptoms he had experienced over the past year.

Claimant described his current employment activities as a self-employed contractor as involving physical activities of bending, squatting and ladder climbing. He lifts in the 25 to 35 pound range and if heavy lifting is required he has someone either do it for him or he gets help. Claimant works 40-50 hours per week.

Dr. Stein's diagnosis was spondylolisthesis between L5-S1 and possibly disc protrusion at the L4-5 level. The x-rays that Dr. Stein reviewed showed a solid anatomical fusion. Dr. Stein expressed the opinion that it is not unheard of for a person after this type of surgery to continue to have complaints. No evidence was found of nerve root impingement or nerve root compression. The doctor opined that claimant's current problems were mechanical and soft tissue symptoms.

Dr. Stein was asked, based on the medical records he reviewed and the history claimant related to him, his opinion as to whether claimant's current symptomatology was a result of the 1996 work-related low back injury or subsequent events? Dr. Stein replied, "...I think that his symptomatology is a continuation of his original injury."[4] Dr. Stein's May

[4] Dr. Stein's deposition, June 8, 2001, p.9.

29, 2001, medical report, further concluded that claimant's work activities at United Methodist Youthville and claimant's current self-employed contractor work activities were not causing significant symptoms other than what claimant had previously. Dr. Stein went on to opine that claimant's current work activities had added no additional structural injury.

On cross examination, however, respondent's attorney provided Dr. Stein with lengthy hypothetical questions regarding his representation of the work activities claimant was performing on the surveillance videotapes. The hypothetical questions were objected to by the claimant's attorney on the basis that the questions misstated the events and activities as shown on the videotapes. Dr. Stein was never shown the videotapes.

The hypothetical questions asked by respondent's attorney, among other work activities, described claimant working at ground level bent over at the waist constantly for hours, using a sledge hammer to break up concrete, lifting in excess of 25-35 pounds, lifting a 100 pound packer by himself, putting sheet rock on walls and ceilings, and doing demolition of concrete with a sledge hammer. Based on the assumption that claimant was performing those activities as described, Dr. Stein answered two of the hypothetical questions that those activities possibly could have aggravated claimant's low back injury. Finally, after the last lengthy hypothetical, Dr. Stein was asked, "If that person is doing that work on a consistent basis weeks in a row, wouldn't you assume that with his mechanical back problems that he exhibited back in 1996 and are shown on x-ray and MRI that that person is going to have mechanical and soft tissue complaints of pain?" Dr. Stein answered, "Yes, I think that if somebody were doing that kind of activity at that level and intensity over a prolonged period of time that that could aggravate their back."[5]

On redirect, Dr. Stein answered yes to the statement that it was not unusual for a person who had the type of injury and surgery that claimant had experienced to have soft tissue problems. Additionally, Dr. Stein answered no to the question if somebody was active and working within Dr. Lewonowski's restrictions would it be uncommon for them to have the symptoms that claimant has described to you. Finally, Dr. Stein was asked, "... given the information [claimant] provided to you, given his active lifestyle, is it within a reasonable degree of medical probability that his waxing and waning symptomatology over the years is related back to1996 as opposed to his current activities of working in a physical position fifty-five hours a week?" Dr. Stein answered, "Yes, it's consistent.[6]

The ALJ was convinced from his viewing of the surveillance videotapes that claimant performed much greater activity than he previously represented and such a level of activity would increase his symptoms from the previous injury. The ALJ went on to find that, if Dr. Stein would have seen the work activity claimant was performing on the videotape, he had

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[5] Dr. Stein's deposition, June 8, 2001, p. 23.

[6] Dr. Stein's deposition, June 8, 2001, p. 27-28.

no doubt Dr. Stein would have found those activities inappropriate for someone with a two level spinal fusion.

But Dr. Stein did not view claimant's work activities as shown on the surveillance videotapes. Dr. Stein only expressed his opinion based on the hypothetical questions imposed by respondent's attorney. The Board also has had an opportunity to view claimant's work activities as shown on the surveillance videotapes. The Board agrees some of claimant's work activities exceeded those he described during his post-award hearing testimony. But those videotapes were taken after the hearing and claimant testified, at his subsequent deposition, that the videotapes showing him pouring the concrete and digging the dirt in preparation for pouring concrete was the first time he had performed those particular work activities. Additionally, the Board finds that even though claimant's activities performed on the videotapes exceeded his previous testimony, none of those work activities, other than possibly the one time claimant lifted the 100 pound packer with another worker, exceeded Dr. Lewonowski's permanent restrictions.

Moreover, the hypothetical questions asked by respondent's attorney to Dr. Stein contained many inaccuracies and misrepresented the actual work activities claimant actually performed on the videotapes. For example,, the videotapes showed claimant scooping sand but claimant only scooped the sand for 26 minutes instead of the 40 minutes contained in the hypothetical question. Also, claimant bent over from the waist while working but not constantly for hours as represented in the hypothetical question. In fact, the three surveillance videotapes were taken over five separate days and only shows two hours and fifty-three minutes of claimant's work activities. Additionally, the videotape showed claimant using a sledge hammer to break concrete only on two occasions, once with two hands and the other time with one hand. Both times claimant took half swings and broke larger concrete pieces into smaller pieces. Also the only time claimant individually lifted more than 25-35 pounds was when he lifted the 100 pound packer with another worker. The videotapes do not show claimant performing any sheet rock work as contained in the hypothetical. Finally, in the last hypothetical proposed by respondent's attorney, Dr. Stein was asked to assume that claimant was performing the work described in the hypothetical on a "consistent basis weeks in a row."[7] And with that assumption, Dr. Stein was asked if a person that had bad back problems as claimant had as a result of the 1996 work injury was going to have mechanical and soft tissue complaints of pain? That hypothetical question is inaccurate because there is no evidence in the record that claimant performed those type of work activities on a "consistent basis weeks in a row."

The first question that needs to be addressed in this case is whether claimant is in need of further medical treatment. The Board finds claimant's testimony coupled with Dr. Stein's medical opinions prove that claimant suffers mechanical and soft tissue low back

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[7] Dr. Stein's deposition, June 8, 2001, pp. 22-23.

symptoms and is in need of medical treatment. Dr. Stein recommended that claimant should have lumbar space x-rays with good flexion and extension views and a MRI scan of the lumbar spine to see if there was any instability in the area above the fusion. If the diagnostic studies fail to show anything definitive then symptomatic treatment in the form of rest, heat, ice as needed would be helpful in the future. Dr. Stein also opined that he felt it would be reasonable for claimant to try anti-inflammatory and on occasion pain medication prescribed by a physician. But claimant should try to avoid narcotic pain medication. For the most part, however, Dr. Stein recommended that claimant be restricted to the over-the-counter medication he is now using.

The next question is whether claimant's current need for medical treatment is the result of his current self-employed contractor work duties, or, instead, is the natural and probable consequence of his compensable 1996 low back injury.

When a primary injury under the Worker Compensation Act arises out of and in the course of the employment every natural consequence that flows from the injury is compensable if it is the direct and natural result of the primary injury.[8] The natural consequence rule applies only to a situation where a claimant's disability gradually increases from a preexisting compensable injury and not when the increase in disability results from a new and separate accident.[9] In Gillig, claimant twisted his knee while getting off a tractor and his knee later locked up while he was watching television. The Kansas Supreme Court affirmed the district court holding that claimant's knee injury, that occurred some two years following a work-related knee injury, was the natural and probable consequence of the original injury. One of the factors the Kansas Supreme Court considered when it affirmed the district court holding that the original injury was ultimately responsible for the current surgery, was that claimant's original injury remained symptomatic and had not healed. But in Stockman, the Kansas Supreme Court held that claimant's current low back problem and need for medical treatment was the result of a new and separate intervening accident. Claimant's argument that his current back injury was the direct and natural result of his primary work injury was rejected. The Kansas Supreme Court held the natural consequence rule applies to a situation where claimant's disability gradually increases from a primary accidental injury but not when the increase in disability results from a new and separate accident.

There often is, as this case demonstrates, a fine line between whether claimant suffered increased disability or whether claimant's current need for medical treatment is the result of the compensable primary injury or a new and separate accident. Here, the Board finds the more persuasive and credible evidence contained in the record proves claimant's current need for medical treatment for his low back condition is a natural and

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[8] *See* Gillig v. City Service Gas Co., 22 Kan. 369, Syl. ¶ 2, 564 P.2d 548 (1977).

[9] *See* Stockman v. Goodyear Tire & Rubber Co., 211 Kan.260, 505 P.2d 697 (1973).

probable consequence of his 1996 low back injury. Although claimant presently is engaging in physical labor, the respondent, through its surveillance videotapes, has not shown that claimant is working outside his permanent restrictions. Claimant testified and presented Dr. Stein with a consistent history that his low back symptoms have been present and have progressed since his January 15, 1997, surgery. Those symptoms wax and wane at the present as they have done since the surgery. Additionally, the Board finds significant that before claimant commenced working as a self-employed contractor he received needed medical treatment from physiatrist Dr.Jahnke from June 1999 through April 28, 2000. At claimant's last appointment with Dr. Jahnke on April 28, 2000, the doctor prescribed medication for claimant to take to relieve his continuing low back symptoms and recommended that claimant see a therapist for integrative technique. And Dr. Jahnke instructed claimant to return in one month.

Dr. Stein found claimant with mechanical and soft tissue symptoms and he related those symptoms to claimant's low back injury. The Board finds persuasive Dr. Stein's opinion that it's consistent within a reasonable degree of medical probability that if claimant has worked within his permanent restrictions over the years since his back injury and surgery then his waxing and waning symptoms are related to his 1996 low back injury and are not related to his current work activities. The Board also gives little weight to Dr.Stein's answers to respondent's hypothetical questions because of the inaccuracies and misrepresentations contained in those questions.

The Board, therefore, concludes that the ALJ's Award that denied claimant's request for medical treatment should be reversed. The Board grants claimant's request for medical treatment for his low back injury through Scott R. Jahnke, M.D. including any referrals until released as having met maximum medical improvement.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Board that ALJ Bruce E. Moore's August 31, 2001, Post-Award Medical Award is reversed and respondent is ordered to provide medical treatment for claimant's low back injury through Scott R. Jahnke, M.D. including any referrals until released as having met maximum medical improvement.

The ALJ's order assessing all fees and expenses of administration of the Workers Compensation Act that are listed in the ALJ's Post-Award Medical Award against respondent and its insurance carrier is adopted by the Board.

**IT IS SO ORDERED.**

Dated this ____ day of February 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Townsley, III, Attorney for Claimant
James M. McVay, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Workers Compensation Director